89-609

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

vs.

NATIVE VILLAGE OF TYONEK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Native Village of Tyonek could exclude Petitioners from Tyonek, Alaska, on the basis of their race.

2. Whether the Native Village of Tyonek has tribal status which will justify or provide immunity for racially discriminatory village ordinances and rules.

3. Whether any vestige of tribal status of Native Village of Tyonek and tribal sovereign immunity flowing therefrom was extinguished by Congressional enactment of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-1628.

4. Whether the constitutional and federal claims of Petitioners based on violation of the United States Constitution and Civil Rights Act, 42 U.S.C. § 1981, § 1982, § 1983 and § 1985, are barred by principles of tribal sovereign immunity.

5. Whether tribal sovereign immunity has been waived by the Native Village of Tyonek either by adoption of a consent to sue or be sued clause in the corporate charter or by bringing a complaint against Petitioners in federal court or by the Indian Civil Rights Act.

6. Whether individual village officers of the Native Village of Tyonek through intentional, malicious and unconstitutional conduct have deprived themselves of derivative immunity from Native Village of Tyonek.

PARTIES TO THE PROCEEDING

Counsel of record for Petitioners certify that the only persons who have an interest in the outcome of this case are all parties to the above-captioned matter. These representations are made to enable the Justices of the Court to evaluate possible disqualification or recusal.

1. The plaintiff is the Native Village of Tyonek. Its village council members are sued as third-party defendants and are identified as follows:

A. Donald Standifer

B. Bonnie McCord

C. Al Goozmer

D. Emil McCord, Sr.

2. The defendants named in the original action and asserting counterclaims are:

A. Donald Puckett

B. Erna Puckett

C. Fred Slawson

D. Virginia Slawson

3. Other named defendants sued by Native Village of Tyonek are:

A. Alexandria Kaloa

B. Esther Kaloa

C. Alec Constantine

D. Olga Constantine

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JURISDICTION

The Judgment of the Ninth Circuit United States Court of Appeals was entered on August 11, 1989. Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 19.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Since the constitutional and statutory provisions involved are lengthy, the citations alone are set forth below. The pertinent text is set forth in Appendix C, App. 37 - App. 51.

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Fair Housing Act

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Alaska Native Claims Settlement Act

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- Federal Rule of Civil Procedure

- Rule 13, counterclaim and cross-claim.

STATEMENT OF CASE

This is a case about the decision of the Native Village of Tyonek ("NVT") to kick two families out of the village on the sole basis of their race. Tyonek is a "bush" Alaska village located approximately 43 air miles southwest of Anchorage, Alaska. Cr. 46. It is an isolated community, accessible only by air, located within the boundaries of the Kenai Peninsula Borough, State of Alaska. The village of Tyonek is not organized as a municipality under Alaska law. Cr. 46.

From approximately 1977 until 1981, Donald and Erna Puckett and their four children lived at Tyonek Timber Camp, located just outside the village of Tyonek. Cr. 99. The Puckett children attended the local Tyonek school, the R. L. Bartlett School, with other native and non-native children of the village of Tyonek. Cr. 63, Deposition of Erna Puckett. Donald Puckett worked as a millwright at the Tyonek Timber Camp until he was laid off in October 1981. *Id.* During this time, Erna Puckett worked as a substitute teacher and a cook at Bartlett School in Tyonek. *Id.*

In 1981-82 school year, Erna was hired as a secretary to the high school principal. *Id.* Since the Timber Camp

was closing down, the Pucketts requested and received permission from the Village Council to reside in the village for the 1981-82 school year. However, after the Pucketts rented and moved into the Kaloas' house in Tyonek, a petition drive was started by Bonnie McCord, a Village Council member, to gain support to have the Pucketts excluded from the village of Tyonek. Cr. 50.

During this same time period, in December 1981, Fred and Virginia Slawson sought permission to live in and rent the Constantine house in Tyonek. Unlike the Pucketts, Fred Slawson was a shareholder of Tyonek Native Corporation and Cook Inlet Region Inc. Native Corporation, having been previously married to a native resident of Tyonek. Moreover, Fred Slawson had children from that marriage living in Tyonek. However, as a result of the mounting passion to exclude the Pucketts, the Slawsons too were victims of the surge of xenophobia and were denied permission to live in Tyonek by the Village Council.

The NVT Village Council's basis for excluding and evicting the Pucketts and Slawsons was Village Ordinance 65-32 and Village Rule No. 4, which purported to give the NVT authority to exclude non-members from Tyonek housing and "whites" from Tyonek.

Village Rule No. 4:

> Any white man except government or outsider coming in is allow to stay only 24 hours. [sic] If weather permits them to go. And is not allowed to bring any liquor. Article No. 4 have to be put up in posters. And anyone destroying these papers will be subject to penalty. $25.00 fine if caught destroying the poster. [sic]

Rules for Laws, of the Native Village of Tyonek (May 18, 1942).

When the president of NVT's Village Council was questioned specifically on the reasons behind the Village Council's decision to exclude the Pucketts and the Slawsons, the only justification given was their race:

Q. And the Pucketts and Slawsons are being asked to leave because they are white; is that not true?

A. That's correct.

Q. Have they done anything else, have they violated any ordinances or done anything to any of the other villagers?

A. They are violating Ordinance 65-32 and also the rule of the government.

Q. Which relates to whites living in the village?

A. That's correct.

Q. Apart from these ordinances, or rules or regulations relating to whites living in the village, have they violated any other ordinance or rule of the village?

A. Not that I am aware of.

Q. Have they done anything else to adversely affect the village, apart from being white?

A. No. Not – with the exception of violation of 65-32 and also the rules of the government.

Q. Which relates to whites living in the village?

A. Yeah. Right.

Cr. 63, Standifer Deposition.

In the effort to exclude the Pucketts and the Slawsons from Tyonek, NVT filed its lawsuit in federal court against the Pucketts and Slawsons to exclude them as white families and against the Kaloas and Constantines to prevent their renting to the Pucketts and Slawsons.

Q. As I understand it, the – or I infer from what you are saying, the Village Council no longer approves any rentals by native families, such as the Constantines and the Kaloas, to whites; is that correct?

A. That's correct.

Q. It doesn't matter whether the Slawsons or the Pucketts, it's any white families, is that correct?

A. That's the way it's always been, and that's the way it will continue to be. I might add one thing. I might be going overboard here, but I'd like to clarify. I know we're hitting on whites. If they were black, it would be the same situation. The white was put in our rules for government back in the '40s, there were no black people around here, the people – everybody who came around were whites, so we just called them white so –

Q. It could be for whites, blacks, orientals?

A. Right.

Cr. 63, Standifer Deposition.

The reason NVT wishes to exclude the Pucketts and Slawsons from the village of Tyonek is admittedly one of maintaining racial purity. Cr. 50. The campaign of harassment, the petition drives, the vandalism and the lawsuit were all effective tools in achieving this goal. Life in an isolated community is hard. The difficulty of bush life

stems from extreme weather conditions faced in Alaska plus the psychological pressures of isolation. In this kind of environment, individuals need a sense of belonging in a community to survive. Instead, the Pucketts and Slawsons experienced threatening phone calls, and their houses were repeatedly broken into and vandalized.

The Pucketts and Slawsons faced increasing impediments to living in Tyonek. Once they were identified by the Village Council of NVT as pariahs, it was only a matter of time before the Pucketts and Slawsons were forced to abandon their desire to live and work in the village of Tyonek. The Pucketts had friends in Tyonek, and Mr. Slawson had a child from a previous marriage living in Tyonek. The Pucketts' children wanted to graduate with their native and non-native friends at Tyonek's Bartlett School.

In response to NVT's complaint for eviction, the Pucketts and Slawsons filed counterclaims against NVT and a third-party complaint against four officers of the IRA Village Council for damages. The Puckett and Slawson counterclaims invoked federal jurisdiction pursuant to 28 U.S.C. § 1343, 28 U.S.C. § 1331, 42 U.S.C. § 3612, 28 U.S.C. § 2201. They alleged both private and intentional acts of discrimination committed by NVT and its Village Council officers in violation of 42 U.S.C. § 1981, as well as private racial discrimination in the sale or rental of property in violation of 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. § 3604 and § 3617. The counterclaim also alleged violation of the First and Fourteenth Amendments of the United States Constitution in violation of the Civil Rights Act of 1871 (42 U.S.C. § 1983 and § 1985). The counterclaim also alleged various state

tort causes of action as well as violation of state discrimination in housing laws and violation of the Indian Civil Rights Act, 25 U.S.C. § 1302(a).

Upon cross motions for summary judgment, the federal district court dismissed the NVT complaint for lack of subject matter jurisdiction and the counterclaims and third-party claims of the Pucketts and the Slawsons on the basis of NVT's tribal immunity. The court concluded that NVT's history and the manner in which the federal government had dealt with Tyonek entitled NVT to sovereign immunity from suit. *See,* Appendix B.

On December 22, 1986, final judgment based on the findings and conclusions of the court was entered dismissing all claims and counterclaims. *See,* Appendix B. On January 19, 1987, the Pucketts and Slawsons filed a timely notice of appeal of the dismissal of their counterclaims and third-party claims. (Doc. No. 87-3569.) Cross-appeals were subsequently filed by NVT and co-defendant native landlords Kaloas and Constantines. (Doc. Nos. 87-3587 and 87-3588.)

On August 11, 1989, the United States Court of Appeals for the Ninth Circuit entered an unpublished Memorandum decision reversing the district court's dismissal of NVT's complaint for lack of subject matter jurisdiction. In a terse one-line statement, the court affirmed the dismissal of the counterclaims and third-party claims of the Pucketts and Slawsons.

On August 26, 1989 co-defendants Kaloas and Constantines filed a petition for rehearing on the question of

subject matter jurisdiction of NVT's complaint. This petition for rehearing was filed only in the Kaloa and Constantine/NVT appeals (Docket Nos. 87-3587 and 87-3588). These appeals were not consolidated and were treated separately by the Ninth Circuit as not bearing on the affirmance of the Puckett and Slawson appeal. (Doc. No. 87-3569.) Therefore, jurisdiction lies with this Court pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 17.1.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION GRANTING TRIBAL SOVEREIGN IMMUNITY TO NVT IS IN CONFLICT WITH AN ALASKA SUPREME COURT DECISION DENYING TRIBAL SOVEREIGN IMMUNITY TO A NATIVE ALASKAN VILLAGE.

A. The Status of Native Villages in Alaska As Tribal Entities Is Still An Open Question.

In *Native Village of Stevens v. AMP*, 757 P.2d 32 (Alaska 1988), the Alaska Supreme Court concluded that Alaska native villages similar to NVT are not entitled to tribal sovereign status:

> Stevens village does not have sovereign immunity because it, like most native groups in Alaska, is not self-governing or in any meaningful sense sovereign. . . . [Cites omitted.] [T]he history of the relationship between the federal government and Alaska Natives up to the passage of the Alaska Indian Reorganization Act, 49 stat. 1250 (1936) indicates that Congress intended that most Alaska Native groups not be treated as sovereigns. Finally, neither the Alaska

> Indian Reorganization Act, nor subsequent Congressional acts have signaled a change from non-sovereign to sovereign status.

Id., at p. 34. Even the dissenting opinion in *Native Village of Stevens, supra,* noted that Congress has steadfastly avoided any attempt to find the extent and limits of native sovereignty in Alaska. *Id.*, at 49. The dissenting justice cited to the most recent "1991" Amendments to the Alaska Native Claims Settlement Act ("ANCSA"), wherein Congress declared that it sought neither to "confer on, or deny to, any native organization and any degree of sovereign governmental authority over lands . . . or persons in Alaska." Alaska Native Claims Settlement Act of 1987, Pub.L. No. 100-241, § 2(a)(B), 101 stat. 1788, 1789 (1988). *Id.* The dissenting justice opined that Congress had simply abdicated to the courts this critical issue of defining the extent and limits of tribal sovereignty held by Alaska native villages. *Id.*, at 50.

Similarly, the Ninth Circuit has long wrestled with the uncertain and difficult issue of tribal status of native Alaskan villages. *See, State of Alaska v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988).[1] The court noted

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[1] Other recent Ninth Circuit and Alaska cases which have wrestled with tribal sovereignty of Alaska native villages are: *Native Village of Noatak v. Hoffman,* 872 F.2d 1384 (9th Cir. 1989); *Native Village of Venetie IRA Council v. State of Alaska,* 687 F.Supp. 1380 (D.Alaska 1988); *In the Matter of 1981, 1982, 1983, 1984 and 1985 Delinquent Property Taxes Owed to the City of Nome Alaska,* ___ P.2d ___ (publication pending) (Alaska Sept. 22, 1989).

that recognition of many Alaska native villages as IRA organizations was not conclusive evidence of tribal status. *Id.*, at 1387, *citing, Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). The court cited argument that "[T]he language of the IRA's Alaska Amendment (cite omitted) raises doubt as to whether IRA organization should be construed so conclusively in the case of Alaska Natives." *Id.*, at 1387.

The writ should be granted in order for the United States Supreme Court to resolve this lingering and festering issue over the tribal status of Alaska native village governments and the extent to which IRA village councils can claim tribal sovereign immunity.

B. NVT Has Never Been Recognized As A Tribe By A Federal Government Agency.

As the court directed in *State of Alaska v. Native Village of Venetie, supra*, at 1387, if organization under the IRA does not settle the question, one next looks to whether the federal government has otherwise recognized the tribal status of the village. As noted by the Alaska Supreme Court in *Native Village of Stevens, supra*, neither Congress nor the Executive Branch has singled out or granted sovereign status to native villages in Alaska. Although NVT asserts it is a "federally recognized Indian tribe" and brings suit to exclude non-members from the village of Tyonek, this assertion is unsupported by the record.

The United States Department of the Interior has repeatedly failed to recognize Alaska villages as tribes.

The department has listed Alaska Native Villages, including Tyonek, as "entities" and not as "tribes." 47 Fed.Reg. 53133-135 (1982). Thus, the Executive Branch has refused to denominate Tyonek as a "tribe."

A careful review of the cases raised by NVT to establish its tribal status reveals no specific recognition of NVT as a tribe. In *Fondahn v. Native Village of Tyonek*, 450 F.2d 520 (9th Cir. 1971), an action was brought seeking enforcement of a constructive trust on revenues obtained from lease of oil and gas reserves. In *Fondahn*, it was alleged by the plaintiff, who was a village resident of Tyonek, that the NVT was a tribe. Therefore, the issue was conceded by the plaintiff and was not in dispute.

Similarly, in *Olestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977), the Alaska Supreme Court refused to intrude on a determination of tribal membership. Again, the plaintiff to the action had conceded the tribal status of NVT and wanted a judicial determination of her participation as a member. The Alaska court merely refrained from resolving such a dispute. However, this is not a judicial recognition of NVT's tribal status.

Finally, in *United States v. Booth*, 161 F.Supp. 269 (D.Alaska 1958), the court held that the Metlakatla reservation was not Indian country, and went on to note the historical differences in federal policy toward the Alaska native population and non-native Alaskan populations. As noted in all early federal cases on the subject, the villages of native Alaskan peoples were not considered to be Indian country. *See, United States v. Seveloff*, 1 Alaska Fed. 64, 2 Sawy. 311 (D.C. Oregon 1872); *Walters v. Campbell*, 1 Alaska Fed. 91, 5 Sawy. 17 (D.C. Oregon 1876); *Kie*

v. United States, 27 Fed. 351, 1 Alaska Fed. 125 (1892); and *In re Sau Quah*, 31 Fed. 327, 1 Alaska Fed. 136 (1886).[2]

C. Historical Factors Do Not Support A Finding of Tribal Status.

Failing to find specific federal government recognition, the next level of inquiry is "careful scrutiny of various historical factors." *State of Alaska v. Venetie, supra*, at 1387. A decidedly different relationship and history of experience has always existed between the federal government and Alaska natives. The distinct nature of this relationship has been previously noted by the U.S. Supreme Court. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), Justice Frankfurter described these differences as follows:

> The Indians of southeastern Alaska, who have very substantially adopted and been adopted by white men's civilization, were never in the hostile and isolated position of many tribes in the other states. As early as 1886, a federal judge, holding Alaska Indians subject to the Thirteenth Amendment, denied that the principle of Indian National Sovereignty enunciated in *Worcester v. Georgia*, 8 L.Ed. 483, applied to them. There were not Indian wars in Alaska, although on at least

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[2] The only exception is *In re Petition of McCord*, 151 F.Supp. 132 (D.Alaska 1957), in which the court granted a writ of *habeas corpus* on the theory that federal criminal statutes did not extend jurisdiction over alleged acts of a defendant in Tyonek. However, the court decision did not recognize Tyonek as a "tribe" but only as "Indian country" for the sole purpose of whether there was territorial criminal jurisdiction. This factually distinct case is not precedent for the tribal status of NVT.

> one occasion there were fears of an uprising. There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many other states, was not to confine the Indians for the protection of white settlers, but to safeguard the Indians against exploitation. Alaska Indians are now voting citizens, some of whom occupy prominent public office in state government.

Id., at 50-51.

The Supreme Court of Alaska, in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), also observed the difference in treatment of Alaska native peoples from Indians in other states. The court noted these distinctions began because Alaska natives were initially under Russian rule. The court also remarked on the seemingly limitless physical resources of the territory of Alaska, which minimized displacement of Alaska natives by the white civilization. These differences partially explain the lack of reservations in the State of Alaska.

Finally, the Alaska court noted in *Atkinson v. Haldane*, that:

> [E]ven though the purchase of the [Alaska] territory occurred in 1867, four years before the termination of the Senate's power to ratify treaties with the Indians, the government never attempted to enter into any treaties with the Alaska natives.

Id., at 155, *citing*, Cohen, *Handbook of Federal Indian Law*, 405 (1942) (2d printing, University of New Mexico). The court also cited this treatise for the proposition that:

> The Native villages and communities of Alaska were not organized on 'tribal lines,' and the

> village rather than the ethnological tribe has been the central unit of organization.

Id., at p. 155, n.12, *citing*, Cohen, *supra*, at n.9 at 414 and n.208. The history of Alaska native self government has generally been the "village" system as opposed to the "tribal" system. *See generally*, Hipler and Cohen, "The Village Council and Its Offspring: A Reform of Bush Justice," 5 UCLA – Alaska Law R. 22 (1975).

This village system of government has been recreated by Alaska natives as subgroups or combinations of larger ethnic groups, *i.e.*, Inupiat, Aleut, Athabascan or Tlingit peoples combining into one village council. In many instances, these village councils or IRA organizations exist within contiguous geographic locations of incorporated Alaska municipalities. Examples can be found in numerous Alaska municipalities such as (1) Sitka, Alaska and the Native Sitka Community Association, (2) Cordova, Alaska and the Native Village of Eyak, and (3) Ketchikan Indian Corporation, which is organized under both the IRA §§ 16 and 17, yet has members who "are not descended from any particular Indian community, but are natives of different groups who happen to live in Ketchikan," *Board of Equalization v. Alaska Native Bhd. and Sisterhood*, No. 14, 666 P.2d 1015, 1025 (Alaska 1983).

Similarly, in NVT's own constitution and by-laws it is stipulated that a person can be a member of NVT's "tribe" by either being born to a member of the tribe or by seeking admission if one is at least one-quarter native Alaskan, whether he or she is Athabascan, Eskimo or Aleut. Cr. 63, Standifer Deposition. In other words the tribal parameters of NVT are actually quite broad and will admit any one-quarter Athabascan Indian from

Anchorage or one-quarter Aleut from the Alaska chain or one-quarter Eskimo from Western Alaskan or one-quarter Tlingit from the islands around Juneau. This would be similar to a tribal entity formed in a village in the State of Nebraska which admitted a one-quarter Iroquois from the East, with a one-quarter Cherokee from the South, a one-quarter Sioux from the Plains and a one-quarter Apache from the Southwest, each of whom has no other claim to tribal membership other than being American Indian.

NVT's argument that it needs to exclude the Pucketts and Slawsons to preserve and maintain tribal character and identity is specious in the face of such broad parameters of "tribal" membership. NVT's attempt to preserve its racial and cultural purity is futile where its own definition of a tribal member includes a mixture of all native persons in the State of Alaska. In other words the ethnic purity and tribal control NVT seeks to confirm by excluding the Pucketts and Slawsons was long ago destroyed, if in fact it ever existed, by its own liberal rules of admission of all Alaska natives.

There is some general historical authority, as cited by the court below, to demonstrate that Tyonek once existed as a Russian trading settlement in the late 18th Century. This village was subsequently destroyed. Although Indians were observed by Captain Cook, as noted by the court below, in the Cook Inlet region, this "region" is vast and includes the present location of Anchorage, Alaska, the largest city in the State of Alaska. As fully discussed by the Alaska Supreme Court in *Native Village of Stevens v. AMP, supra,* recognition of NVT as an Alaska IRA village provides no confirmation of tribal status.

Finally, the withdrawal of lands in the Moqwakie Reserve in 1915 by President Woodrow Wilson was merely a withdrawal of land to the BIA for benefit of Alaska natives generally in the Cook Inlet/Tyonek region with no reference to a specific tribal community. Thus, it was not until 1939, when NVT adopted a constitution and by-laws pursuant to the Indian Reorganization Act, that NVT first existed as a local entity. There are no facts in the record to support a finding that these people were indigenous to the area of the village of Tyonek and that they were governed by laws and customs of the Athabascan people. There is only evidence that it was a Russian trading settlement. As discussed, *infra*, with the passage of the Alaska Native Claims Settlement Act, the Executive Order creating the Moqwakie reservation in which the village of Tyonek is situated was revoked along with all other native reservations or withdrawals in the State of Alaska. 43 U.S.C. § 1618 (ANCSA).

II. ANY TRIBAL OR INDIAN COUNTRY STATUS OF NVT WAS EXTINGUISHED BY CONGRESSIONAL ENACTMENT OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.

The court below erroneously failed to consider the Pucketts' and Slawsons' claim that Congressional enactment of the Alaska Native Claims Settlement Act ("ANCSA") extinguished NVT's tribal status and, thereby divested NVT of immunity from suit. The court below justified its failure to address this issue by stating the Pucketts and the Slawsons did not assert the argument.

This is incorrect. In their affirmative defenses to the complaint, in their counterclaim and in their motion for summary judgment and order to strike the immunity defenses of NVT, the Petitioners repeatedly argued that the natural and necessary effect of enactment of ANCSA was to extinguish any claim of immunity by NVT. Cr. 39 and Cr. 57.

Under § 19 of ANCSA, 43 U.S.C. § 1618, Congress revoked all native reservations or withdrawals in the State of Alaska, including Executive Order No. 2141, which created the Moqwakie Reservation. Pursuant to § 8 of ANCSA, 43 U.S.C. § 1607, native residents of each village and for each city in the State of Alaska could establish a native "for profit" corporation through which they would receive land and other benefits under ANCSA. Shortly after passage of ANCSA, the residents of the Village of Tyonek formed the "for profit" Tyonek Native Corporation. This corporation received all lands in the village and all lands formerly surrounding and making part of the Village of Tyonek.

In enacting ANCSA, Congress resolved all Alaska native claims and stated this was done " . . . without establishing any permanent racially defined institution, rights, privileges or obligations, creating a reservation system or lengthy wardship or trusteeship." 43 U.S.C. § 1601(b). Congress determined that a special wardship relationship between the federal government and Indian populations in the State of Alaska would not continue. The intent of Congress was to eliminate the reservation form of native land holding and to erect in its place a corporate model of native ownership of land. These native corporations were to be organized pursuant to

state law and would administer and preserve native Alaskan wealth. The native residents of Tyonek are all shareholders in a native corporation, the Tyonek Native Corporation. This corporation owns the land on which the Kaloa and Constantine houses sit. The houses are owned by the Kaloas and Constantines. NVT enjoys no ownership interest in the land or in the houses but seeks to assert its tribal powers to exclude the Pucketts and Slawsons. As one Village Council member of NVT put it: "When you quit exercising the power you lose it." Cr. 50.

The Pucketts and Slawsons submit that the result of such a congressionally mandated system results in the loss of "tribal" autonomy over what might previously have been argued was "tribal" land. The NVT council cannot exclude people from a "reserve" that does not exist. This new legal framework set up by Congress is inconsistent with any notion that NVT or the village of Tyonek can exercise control over the land or retain indicia of sovereignty over land it doesn't own.

By its terms, ANCSA created state "for profit" native corporations to hold NVT's land. These state corporations became subject to state jurisdiction. Consequently, the land selected by the "for profit" native corporation cannot be termed either tribal land or Indian country subject to restraint in alienation.

This corporate approach to the problem of legal status of Alaska natives pursuant to ANCSA represented a bold and innovative departure from past Congressional treatment of Native Americans. The corporate model of organization was adopted along with the concept of free alienability of the selected land following a relatively

brief holding period. NVT and its Village Council are in the anomalous position of asserting legal status and immunity based on some theory of dependent status when it is Tyonek's native corporation which holds the power, the land and the future direction of native Indian wealth in the State of Alaska. The benefit to be obtained from an economically viable corporation with the ability to preserve and increase the wealth of individual native residents was perceived by Congress to be of greater benefit than any tribal right to erect a racially pure barrier around the village of Tyonek. Although the Tyonek Village Council officers may wish to disagree, it was a fair bargain.

III. CLAIMS GROUNDED IN THE UNITED STATES CONSTITUTION AND CIVIL RIGHTS ACT §§ 1981, 1982, 1983 AND 1985 PROTECTING BASIC FREEDOMS OF ALL CITIZENS SHOULD NOT BE BARRED BY PRINCIPLES OF TRIBAL IMMUNITY.

The Court should examine the continued vitality of the doctrine of tribal sovereign immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).[3] Such immunity should not extend to conduct outside internal tribal affairs.

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[3] In *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), the court acknowledged treatise authority for the proposition that the U.S. Constitution did not apply to Indians in the conduct of tribal affairs. However, the court called into question the "present validity of this proposition, as so broadly stated. . . ." *Id.*, at 377.

Tribal authority over regulation of the activities of non-Indians is not absolute. The United States Supreme Court has applied two tests to determine the limit and extent of tribal authority over the conduct of non-Indians. *Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 533 (9th Cir. 1987). The test, as applied in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), is one where tribal sovereignty is divested only when its exercise is inconsistent with the overriding federal interests. *Id.*, at 533. The United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), recognized that, by virtue of the dependent status of Indian tribes, sovereignty to regulate relations between the tribes and non-members is implicitly divested. *Id.*, at 533. In *Montana v. United States*, the Court held that "the exercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation." *Id.*, 50 U.S. at 564. This exception to the inherent tribal regulatory authority is strictly limited to non-member conduct which "threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe." *Id.*, at 566.

There is no threat to "tribal interest" of NVT or its Village Officers created by the presence of the Pucketts and Slawsons in Tyonek. There is no just reason for the viability of tribal immunity for the intentional racial discrimination practiced by NVT. It is undisputed that Petitioners had no ability to obtain control of tribal government or dilute tribal culture in Tyonek more than such dilution has already occurred. The exclusion of the

Pucketts from Tyonek is ludicrous when the Tyonek public school is staffed by resident, non-native families.

Moreover, NVT has realized monies in excess of $12 million from oil and gas leases. These proceeds have been used by NVT to buy commercial buildings in Anchorage, an electric power plant and prefabricated housing for the Tyonek village. Native residents are shareholders in the Tyonek Native Corporation and Cook Inlet Region Native Corporation with holdings in Anchorage and throughout the state. The presence or non-presence of Donald and Erna Puckett and their four children in the village of Tyonek has very little significance in comparison to the major inroads created by native investment in the commerce of the State of Alaska and the American system of capitalism.

Where the acts of NVT are totally inimical to the laws and Constitution of the United States, and those acts are not only unauthorized by any Congressional scheme but are specifically forbidden as racially discriminatory acts, vestiges of tribal sovereign immunity should not be erected to bar the Petitioners' claims. Such conduct cannot be construed as authority delegated to NVT by Congress.

Private causes of action under §§ 1981, 1982, 1983 and 1985 of the Civil Rights Act need no theory of "color of law," tribal or federal, to establish federal jurisdiction. These intentional discriminatory actions of NVT and its Village Council members are distinguishable from the exercise of tribal sovereignty over mineral severance taxes as approved by this Court in *Merrion v. Jicarilla*, 455 U.S. 130 (1982).

Petitioners request this Court to re-examine the vitality of NVT's right to tribal recognition and cultural autonomy to justify a grant of sovereign immunity from suit for intentional and admittedly racial discriminatory practices. To say that NVT is immune from U. S. Constitutional principles would logically mean that NVT could have placed the Pucketts in a slave labor camp for their refusal to leave Tyonek and that such misconduct would be exercised by NVT with impunity, disregarding federal law, equal protection under the laws and the U.S. Constitution. Such a broad statement of tribal immunity cannot be upheld.

IV. ANY SOVEREIGN IMMUNITY HELD BY NVT WAS WAIVED BY NVT'S ACTIONS, ITS ADOPTION OF SUE-OR-BE-SUED CLAUSES OR BY CONGRESSIONAL ENACTMENT.

A. Summary of Waiver Argument.

The Pucketts and Slawsons raised three arguments to the federal court below for finding a waiver of sovereign immunity by NVT: (1) adoption of a corporate charter pursuant to the IRA, which provided that NVT expressly consented to being sued, (2) commencement of an eviction action in the federal court against the Pucketts and Slawsons which subjected NVT to the jurisdiction of the federal court for all compulsory counterclaims arising out of that action; and (3) enactment by Congress of the Indian Civil Rights Act, which has divested NVT of sovereign immunity for intentional violation of the rights enunciated under that Act.

B. NVT Has Expressly Consented To Being Sued In Adopting a Corporate Charter.

In the instant case, NVT acknowledges that it adopted a constitution and by-laws under § 16 of the IRA and a corporate charter sets forth its power. The corporate charter was adopted pursuant to § 17 of the IRA. One of the powers enunciated and adopted by NVT was the power to "sue and be sued." With this adoption, NVT has waived sovereign immunity from suit.

The courts have consistently held that a tribe's adoption of a charter which contained a "sue and be sued" clause was a consent and waiver of any tribal immunity. *See, Fontenelle v. Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir. 1970) and *Parker Drilling Co. v. Metlakatla Indian Community,* 451 F.Supp. 1127 (D.Alaska 1978).

The court below attempted to draw a distinction that NVT's waiver of sovereign immunity was solely for actions taken in its corporate capacity under § 17 of the IRA but that NVT retained immunity for actions taken in its governmental capacity under § 16. This is a distinction without a difference. It is undisputed that NVT sued Petitioners under its § 17 powers to sue and evict the white families from town. Even if the decision to keep Tyonek racially pure was an act of NVT in its governmental capacity under § 16, this governmental "policy decision," if it can be so described, was implemented through NVT's power to sue. In taking that action, NVT expressly consented to being counter-sued under Rule 13(a), Federal Rules of Civil Procedure.

C. Rule 13(a) Of The Federal Rules Of Civil Procedure Requires The Assertion Of Counterclaims Which Arise Out Of The Same Transaction Or Occurrence Which Is The Subject Matter Of The Opposing Party's Claim.

The Ninth Circuit has held that a tribe may waive its sovereign immunity by agreeing to provide for resolution of an issue by federal courts. *See, United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1981). NVT sought to evict the Pucketts and Slawsons through a lawsuit filed in federal district court. NVT submitted itself to the jurisdiction of the court in order to obtain the court's assistance in this racially motivated eviction. Thus, NVT waived any claim of sovereign immunity when it chose to bring legal action against these families to enforce its racially discriminatory ordinances. In *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324 (10th Cir. 1982), the 10th Circuit recognized the principle of "equitable recoupment" while denying defendant's counterclaims. *Id.,* at 1344-45. Unlike the defendants in *Jicarilla,* however, defendants here are unquestionably asserting counterclaims which "arise out of the same transaction or occurrence as the initial cause of action."

D. The Congressional Enactment of the Indian Civil Rights Act Constitutes A Waiver of Sovereign Immunity Under The Facts In This Case.

Even assuming some vestige of tribal status, NVT's immunity will not be effective if it has been divested by Congress or lost by implication. *United States v. Wheeler,* 435 U.S. 313, 322-26 (1978). In *Dry Creek Lodge, Inc. v. Arapaho-Shoshone Tribe,* 623 F.2d 682 (10th Cir. 1982), *cert. denied,* 449 U.S. 1118 (1981), the 10th Circuit found that

authority existed under the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, to enjoin tribal action which would deprive non-Indians of access to their land within reservation boundaries. The court held that where a dispute is between members and non-members (as opposed to a strictly internal tribal matter) and where there is "no remedy within the tribal machinery nor with tribal officials in whose election they cannot participate," a remedy will lie under the Indian Civil Rights Act. *Id.*, at 685. In the case at bar, there is no tribal machinery for relief to which the Pucketts or Slawsons could turn. Their sole protection is that afforded by federal statute, federal common law or the U.S. Constitution. The district court below, citing to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), erroneously interpreted the *Dry Creek Lodge* decision as a "narrow exception" to the general bar of sovereign immunity to suit held by tribal entities.

The case of *Santa Clara Pueblo, supra,* is distinguishable in that it involved a lawsuit by a tribal member against her tribe over internal tribal customs and procedures as applied to her. It is unreasonable to give an expansive reading to the immunity found to exist in *Santa Clara Pueblo* in the case at bar. In the instant case there is no unwarranted intrusion into the internal workings of tribal politics. The immunity identified by the Court in *Santa Clara Pueblo* should not preclude lawsuits by non-members against an Indian entity for alleged intentional violation of Constitutional guarantees and federal laws. This circumscription of tribal immunity would not unduly expand the scope of lawsuits against tribes. Moreover, if tribes and individual officers and leaders of tribes are trampling on the constitutionally protected rights of

their fellow citizens, then the scope of lawsuits against them should expand.

V. NVT OFFICERS ACTED VINDICTIVELY AND UNCONSTITUTIONALLY AND SHOULD NOT ENJOY BENEFITS OF DERIVATIVE IMMUNITY.

The district court below gave short shrift to the Petitioners' claims against third-party defendants, individual officers of the NVT Village Council. The court below erroneously found that these officers enjoyed derivative immunity from suit for their intentional and admitted racial discriminatory actions.

In *Chemehevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047 (9th Cir. 1985), the court discussed the parameters of derivative tribal sovereign immunity. The court stated that tribal officers who:

> . . . exceeded the authority granted by the sovereign, as when an officer has acted unconstitutionally, *the suit is deemed to be against the officer in his or her individual capacity*. Because this suit is not against the sovereign, it is not barred. (Cites omitted.) (Emphasis added.)

Id., at 1051. Once individual Village Council officers of NVT embarked on a course of action to exclude the Petitioners because of their race, they exceeded the permissible scope of their authority as NVT officers. Their actions fomenting discord and hate leave them subject to suit for violation of the Civil Rights Act, §§ 1981, 1982 and 1985, and for state causes of action grounded in tort.

In the instant case, the court below relied in some part on the fact that the houses in which the Pucketts and

Slawsons resided were purchased and built with royalty monies received by NVT on oil lease sales. In simple terms, since NVT paid for these houses, the court assumed that NVT could place conditions or covenants on their alienation.

The court below misconstrued the purposes of 25 U.S.C. § 398(b) in arriving at this erroneous statement of the law. The Petitioners submit that it is not logical for NVT to restrict alienation of houses to non-members merely because proceeds of the oil lease sales are held in trust. The monies are held in trust by the United States "for the use and benefit of such Indians. . . ." 25 U.S.C. § 398(b). This trust relationship does not provide NVT with statutory authority to discriminate in the use of these monies.

Second, it does not logically follow, as the court below inferred, that the Tyonek Family Plan and its restriction on rental to non-members would in any way benefit individual members of NVT. To the contrary, the Kaloas and Constantines have aggressively fought against such a "benefit." The court below merely rubber-stamped the NVT's action and assumed that a racially biased restriction in the Tyonek Family Plan for the sale of houses was for the "use and benefit of such Indians" merely because NVT says it was. Instead, the monies held in trust by the United States for the use and benefit of the Kaloas and Constantines have been improperly restricted by NVT, against the mandate of 25 U.S.C. § 398.

Finally, the court's reasoning would necessarily lead to an illogical result. NVT also purchased an Anchorage

commercial office building with the same oil lease proceeds which were used to purchase houses in the village of Tyonek. Under the court's logic, in the name of "benefiting" its members, NVT could limit and restrict leases of the Anchorage commercial office space on racial grounds. This tortured construction of 25 U.S.C. § 398 cannot be the law and the court below cited no authority for its reasoning on this point.

VI. CONCLUSION

The Village Council officers of Tyonek instigated and incited an atmosphere of hate and fear. Instead of building bridges between societies, the Village Officers of NVT embarked on a course of action which fostered racial discrimination and disharmony. In spite of this attempt to drive a wedge between peoples, Donald and Erna Puckett wanted to continue to live in Tyonek, and their son wished to graduate with his village friends at Bartlett High School. He has also, in the intervening years, married an Alaska native. Conversely, NVT's campaign to preserve racial purity in the village will have a poisonous effect on the native children of Tyonek. Children can have cultural pride without being taught that such pride equates to or springs from racial hatred or the preservation of racial purity and the separation of peoples.

The Pucketts and Slawsons submit that NVT and its Village Officers do not have the power to exclude them from Tyonek, Alaska, merely because of their color. Such blatant racial discrimination subjects NVT and its Village

Officers to claims for damages for unlawful acts committed to deny association, employment and housing on the basis of race.

RESPECTFULLY SUBMITTED this 10th day of October 1989.

JERMAIN, DUNNAGAN & OWENS, P.C.

RANDALL G. SIMPSON
Of Attorneys for Petitioners
Donald and Erna Puckett

ASHBURN & MASON

JULIAN L. MASON
Of Attorneys for Petitioners
Fred and Virginia Slawson

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF TYONEK Plaintiff-Appellee v. DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON, Defendants-Appellants.	No. 87-3569 D.C. No. CV-82-369
NATIVE VILLAGE OF TYONEK, Plaintiff-Appellant, v. DONALD PUCKETT; ERNA PUCKETT; ALEXANDER KALOA; ESTER KALOA; FRED SLAWSON; VIRGINIA SLAWSON; ALEC CONSTANTINE; OLGA CONSTANTINE, Defendants-Appellees.	MEMORANDUM* (Filed Aug 11, 1989) No. 87-3587

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

NATIVE VILLAGE OF TYONEK, Plaintiff-Appellee, v. DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON, Defendants, and ALEXANDER KALOA; ESTHER KALOA; ALEC CONSTANTINE; OLGA CONSTANTINE, Defendants-Appellants.	)	No. 87-3588

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and submitted January 5, 1988
Submission vacated November 28, 1988
and resubmitted August 8, 1989
Seattle, Washington

Before: WRIGHT, ALARCON, and POOLE, Circuit Judges.

The Native Village of Tyonek (Village) instituted this action seeking to evict non-members Donald and Erna Puckett (Pucketts), and Fred and Virginia Slawson (Slawsons), from the village. The Village also sought an

order enjoining village members Alexandra and Esther Kaloa (Kaloas), and Alec and Olga Constantine (Constantines), from leasing their homes to non-members. The Village alleged that the non-members violated Village Ordinance No. 4 and the members violated Village Ordinance No. 65-32.

The Pucketts and Slawsons filed counterclaims against the Village, and third-party complaints against four officers of the Village Council alleging violations of their constitutional and civil rights. The Kaloas and the Constantines moved to dismiss the Village's complaint. The remaining parties moved for summary judgment.

The district court dismissed the Village's complaint concluding the court lacked subject matter jurisdiction under 28 U.S.C. §§ 1331, 1362 and 28 U.S.C. § 2201 (Supp. IV 1986). The court dismissed the counterclaims and third-party claims concluding that the Village is immune from suit under sovereign immunity, and that the officers are protected by derivative sovereign immunity.

The Village appeals from the dismissal of the complaint. The Pucketts and Slawsons appeal from the dismissal of their counterclaims and third party claims. The Kaloas and Constantines appeal from the dismissal of the Village's complaint against them. This court has jurisdiction over each appeal under 28 U.S.C. § 1291 (1982).

The district court concluded it did not have subject matter jurisdiction over the Village's claims against the Pucketts and Slawsons because the claims merely involved the enforcement of a village ordinance which did not involve federal law. In so holding the district court relied on the rationale of *Boe v. Fort Belknap Indian*

Community, 642 F.2d 276 (9th Cir. 1981) which held that the application of a tribal ordinance did not involve a federal question. However, *Boe* is distinguishable from the present situation because *Boe* involved the application of the ordinance exclusively to tribal members.

Significantly, the Village's claims against the Pucketts and Slawsons involve the application of the village ordinance to non-members of the Tyonek village. The rule concerning the application of a tribal ordinance to non-members of a village is expressed in *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989). In *Johnson*, the Chilkat village council sought damages from non-member defendants who removed Chilkat artifacts in contravention of a Chilkat village ordinance. The district court dismissed on jurisdictional grounds. We reversed the dismissal of the claim of the Chilkat Village Council. We held that the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. *Johnson*, at 1473. We concluded a federal question existed because "the heart of the controversy over the claim will be the Villages's power, under federal law, to enact its ordinance and apply it to non-Indians." *Johnson*, at 1473.

A similar question is presented in this case. The Village of Tyonek is attempting to apply its ordinance to non-members of the Tyonek village. Pursuant to Ordinance No. 4, the Village is attempting to bar non-members from staying in the village for any period longer than 24 hours unless they receive the Village's permission to remain. As in *Johnson*, the Village's power to apply this ordinance will require a showing of its authority, under federal law, to enact and enforce this ordinance against non-members of the village. *Johnson*, at 1474.

Accordingly we REVERSE the dismissal of the Village's claims against the Pucketts and Slawsons and REMAND those claims to district court. The remaining portion of the district court judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
District of Alaska

Native Village of Tyonek
v.
Donald Puckett, etal.

Judgment In A Civil Case
(Filed Dec 22, 1986)

CASE NUMBER:
A82-369 Civil

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT claims of Tyonek and the counterclaims of the respondents and third-party claims against Tyonek's officers are hereby dismissed.

APPROVED:

/s/ James M. Fitzgerald
James M. Fitzgerald
U.S. District Court Judge

Date

JOANN MYRES
Clerk

cc: James Vollintine,
Robert Wagstaff,
Randall Simpson (JERMAIN),
Lewis Gordon (BAILY)

Illegible
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BEFORE: THE HONORABLE JAMES M. FITZGERALD, JUDGE

NATIVE VILLAGE OF TYONEK,
Plaintiff,
vs.
DONALD PUCKETT, ERNA PUCKETT, ALEXANDRA KALOA, ESTHER KOLOA, FRED SLAWSON, VIRGINIA SLAWSON, ALEC CONSTANTINE, and OLGA CONSTANTINE,
Defendants.

No. A82-369 Civil

FRED SLAWSON, VIRGINIA SLAWSON, DONALD PUCKETT, and ERNA PUCKETT,
Third-Party Plaintiffs,
vs.
DONALD STANDIFER, BONNIE McCORD, AL GOOZMER, and EMIL McCORD, SR.,
Third-Party Defendants.

REPORTER'S TRANSCRIPT
Wednesday, December 3, 1986
FINDINGS OF FACT CONCLUSIONS OF LAW AND DECISION

REPORTED BY: JANIS G. ROLLER, CSR, CP

PROCEEDINGS

THE COURT: I want to place of record now my decision in *Native Village of Tyonek vs. Puckett, et al.*, and *Slawson, et al., third-party plaintiffs, vs. Standifer, et al.*, third-party defendants, A82-369 Civil.

This case was argued on motions quite some time ago. In the course of their arguments, both counsel made claims of racial discrimination. In reviewing the case, I have found the issues to be both complex and difficult. Indeed, the research required on these issues exceeds that of any other case which comes to mind. It is my purpose now to place the decision on the record with the hope that, if time permits, a published decision will be filed in the case. A transcript of the decision will be prepared and placed in the record of the case setting forth the reasons upon which I reach my decision. The parties, if a copy of the transcript is desired, may order the transcript from the reporter. It is my intention, upon the filing of the transcript, to direct the clerk to enter the final order in this case.

Now, turning to the decision, approximately 43 air miles southwest of Anchorage, on the northwest shore of Cook Inlet, lies the village of Tyonek. Tanana Indians, a subgroup of the Athabaskans, are reported to have inhabited the surrounding area as early as the eighteenth century, when white explorers and settlers from Russia discovered and first colonized Alaska. The British navigator Captain James Cook reportedly observed Athabaskans in the region around 1778 when he mapped Alaska's coastline and explored the inlet that bears his name. *See* Darbyshire and Associates, *Tyonek Community*

Profile (1981); R. D. Arnold, *Alaska Native Land Claims* 13 (1978); Federal Field Commission for Development and Planning, *Alaska Natives and the Land* 255-57 (1968); *see also* Claus M. Naske and H. E. Slotniock, *Alaska: A History of the Forty-Ninth State*, 18, 27, 31-42, (1979).

This proceedings [sic] centers around an attempt by native residents of Tyonek, acting through the Village's native government established pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 473a, 476 (1982), referred to as the "Native Village of Tyonek," to enforce two Village ordinances: one prohibiting non-members of the Village from leasing housing constructed at the Village's expense, and the other prohibiting non-members from remaining in Tyonek more than 24 consecutive hours.

Tyonek initiated the action by requesting this court to enforce the two ordinances against four families – two composed of Village members who "own" Village-subsidized houses and two composed of non-members seeking to lease those houses. The four families challenge the validity of the Village's ordinance prohibiting leasing of the houses, claiming that it violates the federal constitution, the federal civil rights and fair housing laws, and Alaska law. The respondents have filed counterclaims against Tyonek and third-party claims against four of Tyonek's officers. I conclude that this court lacks subject-matter jurisdiction over Tyonek's claims, which are based on the Village ordinances, and, therefore, do not *"arise under" federal law*. I further conclude that this court lacks subject-matter jurisdiction over the repondents' counterclaims and third-party claims because they are barred by Tyonek's tribal sovereign immunity and the derivative

immunity of its officers. I, therefore, dismiss Tyonek's claims and the claims of the respondents.

The Tanana Indians, who currently inhabit Tyonek, have reportedly occupied the surrounding area from as early as the eighteenth century, when white settlers first arrived in Alaska. Tyonek appears to have been the site of a Russian trading settlement in the late eighteenth century where native supplied fox pelts to the Russians in exchange for items of Russian manufacture. That settlement was destroyed, apparently, because of conflicts between local natives and the Russians.[1] *See* Darbyshire and Associates, *Tyonek Community Profile* (1981). Following the purchase of Alaska in 1867, by the United States, the American-based Alaska Commercial Company established a new trading headquarters at Tyonek for the entire upper Cook Inlet. The post was operating by 1875, and became a major disembarking point for people and supplies when gold was discovered at Resurrection Creek near Turnagain in the 1880's. *See id.* Although Tyonek has been moved twice since that time, the village has remained in essentially the same location. *See* Darbyshire and Associates, *Tyonek Community Profile* (1981).

President Woodrow Wilson, in 1915, withdrew over 25,000 acres surrounding the Village of Tyonek and established the Moquawkie Reservation "for the benefit of

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[1] The Russian trading settlement was known as "Tuiunuk," and authorities have indicated that this was probably an alternative spelling of Tyonek. *See* Darbyshire and Associates, *Tyonek Community Profile* (1981). "Tyonek" is a Siberian Yakut word meaning "little chief," while "Ti-i-u'-nuk" is an Eskimo word meaning the "marsh people." *Id.*

Alaskan Natives of that region." Executive Order 2141, February 27, 1915. In 1939, the Natives living in the Village established the "Native Village of Tyonek" by adopting a constitution and bylaws under section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 473a, 476 (1982), and a corporation charter under section 17 of the act, 25 U.S.C., § 477 (1982), both of which were approved by the Secretary of the Interior.

Article II of the Village constitution and bylaws limited membership in Tyonek to those individuals then on the official list of Native residents maintained by the village, the children of Tyonek members, and other Alaska Natives who established homes in the Village and were accepted as members. The constitution provided that Tyonek members could willingly renounce their membership, could have it revoked for good cause, or could lose their membership if they "moved[d] away from the Village, intending not to return." Article II also authorized Tyonek to establish any further rules concerning membership as might be from time to time required.

Tyonek's Village counsel, in 1942, adopted Village Rule No. 4, which prohibits non-members of the Village (other than government employees) from remaining in the Village more than twenty-four consecutive hours without Tyonek's consent.[2]

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[2] According to official Tyonek records, the precise wording of Rule No. 4 is as follows:

> Any white men except government men or outsider coming in is allow [sic] to stay only 24 hrs. If

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In 1965, several oil companies paid Tyonek approximately twelve million dollars for oil and gas exploration rights in the area surrounding the Village. The Tyonek council allocated part of those proceeds to construct approximately sixty houses in the Village and established a "Family Plan" under which families comprised of Village members could apply to the Village for "housing allowances" to build and furnish new homes. On October 5, 1965, during the construction of the "Family Plan" houses, the Tyonek council unanimously passed Village Ordinance No. 65-32, which provided that:

> [T]he interests of members of the Village in houses which are acquired by such members by virtue of the Family Plan of the Village *cannot be sold, conveyed, leased, mortgaged, or otherwise alienated by any member of the Village to a person, corporation, or other legal entity which or who is not a enrolled member of the Village of Tyonek, Alaska.* It is the purpose of this [ordinance] *to insure that private interests in houses in the Village or in the Moquawkie Reservation may only be held by enrolled members of the Village.* Should any alienation be attempted in violation of this resolution, the same shall be void.

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> weather permits them to go [sic]. And is not allowed to bring any liquor [sic]. Article No. 4 have [sic] to be put up in posters. And anyone destroying these papers will be subject to penalty. Twenty-five dollars fine if caught destroying the poster [sic].

Laws of Native Village of Tyonek, Rule No. 4, May 18, 1942.

Tyonek Village Ordinance No. 65-32, October 5, 1965.[3] Title to all houses acquired under the Family Plan was taken subject to the conditions imposed by Village Ordinance No. 65-32.

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[3] Ordinance No. 65-32 was amended in 1981 by Tyonek Ordinance No. 81-1, which retained most of the original ordinance's language, but added an express prohibition barring Tyonek members from bequeathing or devising their interests in Family Plan houses (and the land on which those houses are located) to non-members of Tyonek. Tyonek Ordinance No. 81-1 provides that:

> The interests of the tribal members of the Native Village of Tyonek in houses acquired by such members by virtue of the Family Plan, and the land upon which such houses are located, shall not be sold, conveyed, leased, mortgaged, encumbered, bequeathed, devised, or otherwise alienated, by any member or any other person or entity, to a person, corporation, or other entity which is not or who is not an enrolled member of the Native Village of Tyonek. The purpose of this ordinance is to ensure that private interests in houses in Tyonek Village or in the former Moquawkie reservation may be held only by enrolled members of the Native Village of Tyonek. Any alienation or disposition in violation of this ordinance shall be void. No non-member may inherit any member's interest in the property described herein, whether by testamentary disposition or intestate succession, or otherwise. Any such purported disposition shall be void, and in such event, the village council may dispose of the deceased member's interest in such property to such of his or her heirs who are enrolled members of the Native Village of Tyonek as it may in its discretion decide, giving preference to the heir or heirs who live in the village.

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Congress, in 1971, enacted the Alaska Native Claims Settlement Act, 43 U.S.C., §§ 1601-1628 (1982). Section 19 of the Claims Act, 43 U.S.C. §§ 1618, revoked almost all native reservations in Alaska, including the Moquawkie Reservation. Section 8, 43 U.S.C. 1607, authorized the Native residents of each Village or city in Alaska to establish a Village corporation, through which they would receive land and other benefits under the Claims Act. Shortly after the passage of the Claims Act, the Native residents of Tyonek formed the for-profit Tyonek Native Corporation, to which was conveyed all the lands formerly in the Moquawkie reservation.[4] The Claims Act did not expressly change the status of Tyonek or its IRA Village government, nor did the Claims Act expressly revoke or amend Tyonek's Family Plan or Ordinance 65-32. Tyonek Native Corporation has not been directly involved in administering Tyonek's Family Plan housing, although it currently holds the surface estate of the lands on which that housing is located.

The present dispute arose in 1981-1982 when two Tyonek-member families leased their Family Plan houses to two families not composed of Tyonek members. From

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Tyonek Village Ordinance No. 81-1, July 7, 1981. Tyonek is not seeking to enforce the provisions added by the 1981 amendments in this action, nor are the defendants and third-party plaintiffs challenging those provisions.

[4] Although Tyonek's residents have established an ANCSA village corporation, Tyonek has not organized as a municipality under Alaska law. The village lies within the boundaries of Alaska's Kenai Peninsula Borough, and the Tyonek Village Council is the only village governing body.

approximately 1977 until 1981, Donald and Erna Puckett and their four children lived at the Tyonek Timber Camp outside the Village. Donald Puckett worked at the timber camp. Erna was employed part of that time as the secretary at the R. L. Bartlett School in Tyonek, and their children attended the Bartlett School. In September 1981, most of the operations of the timber camp were closed down, and, on September 30, 1981, the Pucketts requested permission in writing from Tyonek's village council to reside in the village for the remainder of the 1981-1982 school year. The council granted permission, and on October 8, 1981, the Pucketts signed a lease agreement with Esther Kaloa, a Village member, to lease her Family Plan house until June 15, 1982.

On April 28, 1982, Tyonek Village president Donald Standifer wrote the Pucketts on behalf of Tyonek to notify them that they must vacate the Kaloa house at the end of the school year, which was May 27, 1982. However, the Pucketts and Kaloa, on April 30, 1982, renewed their lease agreement for an additional year, until June 25, 1983. They included a provision in the agreement that: "[S]hould the Native Village of Tyonek, by act of the council, vote to remove lessees, by court action, this lease is automatically voided." on June 8, 1982, Standifer again wrote the Pucketts on behalf of Tyonek to remind them that the school year had ended and that their authorization to rent the Kaloa house had, therefore, elapsed. The Pucketts refused to vacate the Kaloa house.

In December, 1981, Fred and Virginia Slawson sought permission from the Tyonek council to reside in the Village, but were denied permission. Fred Slawson is a shareholder of Tyonek Native Corporation and Cook Inlet Region, Inc., and he and his wife have family in Tyonek;

but the Slawsons are not enrolled members of the Villages. On May 29, 1982, the Slawsons leased the Family Plan house of Village members Alec and Olga Constantine, and made the house their residence. The Slawsons, on June 2, 1982, made a written request to the Tyonek council for permission to remain in the Constantine house, but they were again denied permission. The Slawsons continued to reside in the Constantine house.

Tyonek brought this action in 1982 to evict the Pucketts and Slawsons and to enjoin the Kaloas and Constantines from leasing or otherwise alienating their Family Plan houses to non-members of the Village. Tyonek seeks to enforce Village Ordinance 65-32 against the Kaloas and Constantines, contending that it subsidized the construction and furnishing of their houses on the express condition that the houses be used exclusively by Village members. Tyonek also seeks to enforce Village Rule No. 4 against the Pucketts and Slawsons because they have remained in the Village for more than twenty-four hours without the consent of Tyonek.

By answer, the respondents have challenged the validity of Tyonek Ordinance 65-32 under federal and Alaska law,[5] and have brought claims for damages and injunctive relief against Tyonek and several of its officers. The Pucketts claim that in addition to filing this action, Tyonek and its president Standifer, vice president Bonnie McCord, secretary-treasurer Al Goozmer, and Village administrator Emil McCord, Sr., have engaged in other actions intended to drive them from the Village. According to the Pucketts, these included circulating petitions

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[5] The defendants challenge the validity of Village Ordinance No. 65-32, and do not specifically challenge the validity of either Village Rule No. 4 or Village Ordinance No. 81-1.

demanding that the Pucketts leave Tyonek, spreading rumors impugning the character of Erna Puckett, and changing Tyonek's policy to require all non-members of the Village to pay for their electricity, although Tyonek members receive free electricity. The Pucketts also allege that their property has been damaged by vandals and that their house was once stoned by unidentified persons, but they do not allege that Tyonek's officers were personally involved in either of these activities.

ANALYSIS

Subject-Matter Jurisdiction over Tyonek's Claims

Tyonek maintains that this court has subject-matter jurisdiction over its claims based upon three separate provisions: (1) the general "federal question" provision, 28 U.S.C. 1331 (1982); (2) the "Indian tribes" jurisdictional provision, 28 U.S.C. 1362 (1982); and (3) the federal Declaratroy Judgment Act, 28 U.S.C. 2201 (1982). to establish federal court jurisdiction under any of these three provisions, Tyonek must satisfy essentially the same threshold requirement, that is, Tyonek must demonstrate that its claims "arise under" the Constitution, laws, or treaties of the United States. *See* 28 U.S.C., 1331, 1362, 2201. Because Tyonek's claims are all predicated upon two Village ordinances and are not based upon any federal law, treaty, or constitutional provision, I conclude that this court lacks subject-matter jurisdiction over Tyonek's claims.

Federal Question Jurisdiction

The "federal question" jurisdictional provision, 28 U.S.C., 1331, provides that:

> [D]istrict courts shall have original jurisdiction of all civil actions *arising under the Constitution, laws, or treaties of the United States.*

28 U.S.C., 1331. As noted above, Tyonek's claims against the Pucketts, Slawsons, Kaloas, and Constantines are premised entirely upon Village Ordinance 65-32 and Village Rule No. 4. Tyonek has failed to identify any federal law, treaty, or constitutional provision upon which it is relying.[6] *See, generally, Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985).

To the extent that Tyonek's ordinances are equivalent to municipal or borough ordinances, Tyonek's claims plainly do not "arise under" federal law. *See* 28 U.S.C., 1331. Even assuming that Tyonek qualifies as an "Indian tribe" and that its complaint therefore alleges violations of "tribal" ordinances, this alone is not sufficient to establish "federal question" jurisdiction under section 1331. The Ninth Circuit of Appeals has expressly ruled that actions brought to enforce tribal laws and ordinances do not constitute actions "arising under" the laws of the United States, and therefore do not qualify for section 1331 jurisdiction. *See Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279-80 (9th Cir. 1981).

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[6] While Tyonek's amended complaint indicates that it is seeking to enforce Village Ordinance No. 65-32 and Rule No. 4, Tyonek's action could also be characterized as one to enforce the terms of its Family Plan housing contracts with the Kaloa and Constantine Family plan housing contracts with the Kaloa and Constantine families. Yet even if viewed as a contract action, Tyonek's action still arises under Alaska state contract law and therefore does not provide a basis for federal subject-matter jurisdiction. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

Moreover, the fact that Tyonek has an IRA government and that the ordinances involved in this case were "promulgated . . . under the authority of the IRA" does not automatically transform this into an action "arising under" the IRA, since Tyonek's claims "do not involve a dispute or controversy respecting the validity, construction, or effect of the IRA" itself. *See Boe v. Fort Belknap Indian Community*, at 279; *also Littell v. Nakai* 344 F.2d 286, 488 (9th Cir. 1965), *cert. denied*. 382 U.S. 986 (1966). I conclude the IRA does not provide a basis for invoking section 1331 jurisdiction over Tyonek's claims.

Indian Tribes Jurisdiction

Tyonek also contends that this court has subject matter jurisdiction over its claims based upon the "Indian tribes" jurisdictional provision, 28 U.S.C. 1362, which provides that:

> [D]istrict courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, *wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.*

28 U.S.C., 1362.

The Ninth Circuit has noted that the "arises under" proviso contained in section 1362 is virtually identical to the "arises under" language found in section 1331. *See Gila River Indian Community v. Henningson, Durham and Richardson*, 626 F.2d 708, 710, 714 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Section 1362's legislative history indicates that Congress passed the provision in 1966

specifically to enable Indian tribes to bring "federal question" cases, of the type normally brought under section 1331, in federal court without having to satisfy section 1331's then existing $10,000 amount-in-controversy requirement. The legislative history does not indicates that Congress intended to broaden Indian tribes' access to federal courts in any other respect. *See Gila River Indian Community v. Henningson, Durham and Richardson* at 710-714; *accord Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559-60 n.10 (1983); *see also* S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H. Rep. No. 2040, 89th Cong., 2d Sess. 2, 4 (1966); [1966] U.S. Code Cong. and Admin. News 3145; *see also Dillion v. Montana*, 634 F.2d 463, 469 (9th Cir. 1980); *Housing Authority of the City of Seattle v. Washington Department of Revenue*, 629 F.2d 1307, 1312 (9th Cir. 1980). Hence, in order to interpret the "arises under" language of section 1362 consistently with the similar language contained in section 1331, and in order to fulfill Congress' intent as revealed in section 1362's legislative history, the Ninth Circuit has expressly ruled that if an action does not qualify as "arising under" federal law for purposes of section 1331, it cannot be brought in federal court under section 1362.[7] *Gila River Indian Community v. Henningson, Durham and Richardson*, 626 F.2d at 714.

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[7] It should be noted that section 1362 does provide certain jurisdictional advantages to Indian tribes over section 1331, even now that section 1331's amount-in-controversy requirement has been eliminated. Section 1362 provides Indian tribes with an exemption to the Anti-Injunction Act, 28 U.S.C. section 1341 (1982), and thus permits them to seek injunctions in federal district court against the assessment or collection of

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Because Tyonek's claims in this action do not "arise under" federal law for purposes of section 1331, they also cannot be brought under section 1362. I conclude that section 1362 does not provide federal subject-matter jurisdiction over Tyonek's claims.

Federal Declaratory Judgment Act Jurisdiction

Finally, Tyonek contends that this court has subject-matter jurisdiction over its claims under the Federal Declaratory Judgment Act, 28 U.S.C., 2201, which provides that:

> In a case of actual controversy *within its jurisdiction* . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

28 U.S.C., 2201.

It is firmly established that "[t]he Declaratory Judgment Act does not provide an independent jurisdictional basis for suits in federal court." *Fiedler v Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (citing to *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74 (1950)). Instead, the act "merely provides an additional remedy where the court

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state taxes, *see Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976), and at least one court has held that section 1362 removes states' eleventh amendment immunity to suit in actions brought by Indian tribes. *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079-80 (2d Cir. 1982).

has an otherwise valid jurisdictional basis to consider the case." *Karmali v. INS*, 707 F.2d 408, 409 (9th Cir. 1983) (citing Skelly Oil); *accord Fiedler*, 714 F.2d at 79; *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 685 F.2d 1088, 1090 (9th Cir. 1982); *Alton Box Board Co. v. Espirit De Corp.* 682 F.2d 1267, 1274 (9th Cir. 1982); *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985); *see also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983). (quoting from *Skelly Oil*). Since there is no basis for this court to exercise subject-matter jurisdiction over Tyonek's claims under sections 1331 or 1362, or under any other provision, the Court has no subject-matter jurisdiction over Tyonek's claims under section 2201.

Lacking subject-matter jurisdiction over Tyonek's claims under section 1331, 1362, or 2201, or under any other provision, I dismiss Tyonek's claims for lack of subject-matter jurisdiction.[8]

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[8] I note, without deciding the issue, that Tyonek would appear to be entitled to pursue its claims in the Alaska state courts. The Alaska courts are courts of general jurisdiction, and are therefore authorized to resolve claims based on local or village ordinances and Alaska contract law. Moreover, even if the village of Tyonek is considered to be "Indian country", as Tyonek maintains, and its ordinances are considered to be "tribal" ordinances, the Alaska state courts are still authorized to exercise jurisdiction over Tyonek claims. *See* 28 U.S.C. § 1360(a), (c) (1982).

Subject-Matter Jurisdiction over the Pucketts' and Slawsons' Counterclaims and Third-Party Claims

The Pucketts and Slawsons[9],[10] have brought counterclaims against the Village and third-party claims against its officers Standifer, Goozmer, and the McCords, claiming that these parties violated the United States Constitution, federal civil rights and fair housing laws, the Indian Civil Right Act, 25 U.S.C., § 1302 (1982), and Alaska law by attempting to enforce Ordinance 65-32[11] against them and attempting to evict them from the Family Plan houses where they reside.[12] The Pucketts and Slawsons seek declaratory and injunctive relief, as well as compensatory and punitive damages.

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[9] The Kaloas and Constantines have not filed counterclaims against Tyonek or third-party claims against Tyonek's officers.

[10] The Kaloas and Constantines have not filed counterclaims against the Village or third-party claims against its officers.

[11] The Pucketts and Slawsons have not raised any claims based upon alleged attempts of the Village or its officers to enforce Ofdinance No.4, which prohibits white persons and, presumably, other non-members of the Village, from remaining in Tyonek for twenty-four consecutive hours without Village permission. Thus, my analysis or Ordinance No. 4 in the context of reviewing the Pucketts' and Slawsons' counterclaims and third-party claims is merely for purposes of explaining the extent and limitations of the Village's sovereign powers, as well as to provide guidance to the parties regarding future actions they may undertake.

[12] The Pucketts and Slawsons allege specifically that the Village and its officers violated article IV, section 2 of the United States Constitution, the first and fourteenth amendments

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Tyonek and its officers maintain that the Pucketts' and Slawsons' counterclaims are jurisdictionally barred by the Village's tribal sovereign immunity and that respondents' third-party claims against Standifer, Goozmer and the McCords are barred by those individuals' derivative immunity as Village officers. I agree. I conclude, based upon Tyonek's history and the manner in which the federal government has dealt with Tyonek, that the Village possesses sovereign immunity from suit like that of any other Indian tribes in the contiguous United States. I further conclude that neither the federal government nor Tyonek has waived the Village's immunity in this case or consented for the Pucketts and Slawsons to bring counterclaims against it. I also conclude that the claims of the Pucketts and Slawsons against Tyonek's officers are based upon conduct within the scope of these officers' official capacities and within the scope of the authority that the Village is capable of bestowing upon them. I conclude that the claims of the Pucketts and Slawsons, including their third-party claims, should be dismissed for lack of subject-matter jurisdiction.

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to the Constitution, the Civil Rights Act of 1871, 42 U.S.C §§ 1981-1983, 1985 (1982), the Fair Housing Act, 42 U.S.C. §§ 3604, 3617 (1982), the Indian Civil Rights Act, 25 U.S.C. § 1302 (1982), and Alaska Statutes § 18.80.210 (1985) (guaranteeing the right to obtain housing accommodations without discrimination based on race, color, or national origin). The Village also allege that Tyonek and its officers intentionally and tortiously interfered with their contractual agreement to lease the Kaloas' and Constantines' houses and with Erna Puckett's employment contract with the school, all in violation of Alaska law.

Tyonek's Immunity From Suit

Tyonek maintains that the counterclaims against it are all barred by its sovereign immunity as an "Indian tribe" or as an entity similar to an Indian tribe. The Supreme Court and other courts have consistently held that Indian tribes "possess[ ] the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 172-73 (1977); *A.K. Management Co. v. San Miguel Board of Mission Indians*, ___ F.2d ___, ___ (9th Cir. 1986); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986); *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 n.4 (9th Cir. 1986); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985); *Big Spring v. United States Bureau of Indian Affairs*, 767, F.2d 614, 617 (9th Cir. 1985); *Chemehvevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1050 (9th Cir.) *rev'd on other grounds*, 106 S.Ct. 2890 (1985); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 106 S.Ct 2305, 2313 (1986); Felix Cohen, *Handbook of Federal Indian Law* 324 (2d ed. 1982); W.C. Canby, Jr., *American Indian Law* 73 (1981)

Indian Tribes possess immunity from suit "because they are sovereigns predating the Constitution," *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-13 (1940), and it is considered "a necessary corollary to Indian sovereignty and self-governance," *Wold Engineering*, 106 S.Ct. at 2313, essential "to preserve

[tribes'] autonomous political existence . . . [and] tribal assets," *Chemehvevi*, 757 F.2d at 1051, as well as "to promote the federal policies of tribal self determination, economic development, and cultural autonomy *Standing Rock Sioux Tribe*, 780 F.2d at 1378; *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908); *Atkinson v. Haldone*, 569 P.2d 151, 169 (Alaska 1977) (because of their limited revenue base, Indian tribes find lost assets more difficult to replace than other governmental bodies; Felix Cohen, *Federal Indian Law*, at 324-28; Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982). Tribes have been held to possess this immunity even when they have not been officially recognized as Indian tribes by the federal government, when they have no prolonged course of dealing with federal or state governments, when they do not reside on reservations or in "Indian country," and " 'even after dissolution of the[ir] tribal government[s].' " *Bottomly v. Passamaguoddy Tribe*, 599 F.2d 1061, 1065 and nn.5-6 (1st Cir. 1979) (quoting *United States Fidelity and Guaranty Co.*, 309 U.S. at 512); *Maryland Casualty Co.*, 361 F.2d at 521-22; *Hailr v. Saunooke*, 246 F.2d 293, 296 (4th Cir. 1957). The matter of Tyonek's immunity from suit in this action is jurisdictional. *See Big Spring*, 767 F.2d at 617; *Chemehvevi*, 757 F.2d at 1051; *Kennerly v. United States*, 721 F.2d 1252, 1259 (9th Cir. 1983); *Puyallup Tribe* 444 U.S. at 172-73; *United States Fidelity and Guaranty Co.*, 309 U.S. at 512-13, and must therefore be "address[ed] first and resolve[d] irrespective of the merits of the [Pucketts' and Slawsons'] claim[s]." *See Chemehvevi*, 757 F.2d at 1051; *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on*

other grounds, 463 U.S. 713 (1983); *California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 (9th Cir. 1979).

The Pucketts and Slawsons maintain that even if the Village constitutes a tribe possessing immunity from suit, Congress and Tyonek have taken actions that have waived Tyonek's immunity as to the present action. They suggest that three specific actions have waived Tyonek's immunity: (1) Tyonek's initiation of the present litigation; (2) Congress' enactment of the Indian Civil Right Act of 1968, 25 U.S.C. §§ 1301-1341; and (3) Tyonek's adoption of a "sue and be sued" clause in its corporate charter.[13]

The Supreme Court and others courts have consistently ruled that while Congress and individual tribes

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[13] As noted above, the Puckett's and Slawson's do not appear to contend that Congress's enactment of ANCSA has waived the Village's immunity from suit. The Ninth Circuit has consistently "rejected the contention that congressional enactments unrelated to immunity may implicitly grant authority to bring suit against Indian tribes." *Chemehvevi Indian Tribe*, 757 F.2d at 1053; *see Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983). ANCSA does not contain any provisions explicitly mentioning or waiving the immunity of village governments organized under IRA section 16. *See generally* 43 U.S.C. §§ 1601- ___ [sic].

Similarly, the Puckett's and Slawson's do not contend that Congress's enactment of 28 U.S.C. § 1360, commonly known as Public Law 280, operates to waive the Village's immunity from suit. Public Law 280 authorizing particular states to exercise civil and criminal jurisdiction over the Indian country within their boundaries, and it was extended to cover Alaska in 1958. *See Wold Engineering*, 106 S.Ct. at 2314 ("We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity. . . .").

have the authority to waive a tribe's immunity from suit, such waivers "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58; *A.K. Management Co.*, ___ F.2d at ___ ; *Big Spring*, 767 F.2d at 617, *Chemehvevi Indian Tribe*, 757 F.2d at 1052-53; *Kennerly*, 721 F.2d at 1258-59; *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *Standing Rock Sioux Tribe*, 780 F.2d at 1378; *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315, ___ (10th Cir. 1982); *Parker Drilling Co. v. Metlakatla Indian Community* 451 F. Supp. 1127, 1136 (D.Alaska 1978); *see also Wold Engineering*, 106 S.Ct. at 2313, *Puyallup Tribe*, 433 U.S. at 172-73; *Squaxin Island Tribe*, 781 F.2d at 723 n.11. I conclude that none of the claims for waiver asserted by the Pucketts and Slawsons is sufficient to waive Tyonek's immunity from suit.

The Indian Civil Rights Act

The Pucketts and Slawsons contend, based upon the Tenth Circuit's decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), and its progeny, that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341, "constitutes a waiver of [Tyonek's] sovereign immunity under the facts in this case." I do not agree.

The Supreme Court held in *Santa Clara Pueblo* that "[n]othing on the face of . . . the Indian Civil Rights Act purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief," and that "suits against a tribe under the Act are barred by its sovereign immunity from suit." *Santa Clara Pueblo*, 436

U.S. at 59. However, in *Dry Creek Lodge*, the Tenth Circuit interpreted the decision in *Santa Clara Pueblo* to apply only to actions involving "internal [disputes] between tribal members and . . . tribal government[s]," and held that the Indian Civil Rights Act, in effect, waives tribal immunity in cases brought against tribes by non-Indians who "have no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate." *Dry Creek Lodge*, 623 F.2d at 685; *see also White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("The *Dry Creek* decision ought to be interpreted to provide a narrow exception to the traditional sovereign immunity bar from suits against Indian tribes in federal courts," in light of *Santa Clara Pueblo* and because an "expansive interpretation of *Dry Creek* [would] open[ ] up the scope of lawsuits against the tribes"); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982). The respondents contend that because they are not members of the Village and because they have raised "'particularly egregious allegations of personal restraint and deprivation of personal rights,'" against Tyonek and its officers, their counterclaims and third-party claims qualify under the exception created in *Dry Creek Lodge*, and are, therefore, not barred by Tyonek's immunity.

However, the exception carved out in *Dry Creek Lodge* does not appear to be authorized explicitly by the language or legislative history of the Indian Civil Rights Act or by the Supreme Court's analysis in *Santa Clara Pueblo*. *See Santa Clara Pueblo*, 436 U.S. at 58-72 (noting that "it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal counts to secure

enforcement of section 1302." and that the Indian Civil Rights Act legislative history "indicates that the Indian Civil Rights Act was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of 25 U.S.C. § 1303"). Since, as has been noted, "waiver[s] of [tribal] sovereign immunity ' "cannot be implied but must be unequivocally expressed," ' *id.* at 58, the policy justifications articulated by the Tenth Circuit in *Dry Creek Lodge* seem insufficient to establish a waiver of tribal immunity under the Indian Civil Rights Act. *See Dry Creek Lodge*, 623 F.2d at 685-86 (Holloway, J., dissenting) (concluding that *Santa Clara Pueblo's* "broad" language and far-reaching conclusions preclude the result reached by the majority). Moreover, the Ninth Circuit has expressly rejected the Tenth Circuit's analysis in *Dry Creek Lodge* and has "recognized that the *Santa Clara Pueblo* holding 'foreclosed any reading of the Indian Civil Rights Act as authority for bringing civil actions in federal court to request . . . forms of relief [other than habeas corpus].'" *R.J. Williams Co. v. Fort Belknap Housing Authority*, 619 F.2d 979, 981 (9th Cir. 1983); *accord National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 736 F.2d 1320, 1322-23 (9th Cir. 1984) ("Congress has expressly limited federal court review of a claimed violation of the Indian Civil Rights Act to encompass a single remedy: the writ of habeas corpus . . . A civil suit to enjoin violations of the Indian Civil Rights Act is not cognizable in federal court.") *rev'd on other grounds*, 105 S.Ct. 2447, 2450 and n.3 (1985); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457, 1458 (D.Nev. 1986). I reject respondent's contention that the Indian

Civil Rights Act waives Tyonek's immunity for purposes of the litigation.

The respondents also contend that Tyonek waived its sovereign immunity by initiating the present litigation. I disagree. The Ninth Circuit has held that a Indian tribe's initiation of an action against a party does not waive the tribe's immunity from suit as of counterclaims brought by that party. *Squaxin Island Tribe*, 781 F.2d at 723; *Chemehuevi*, 757 F.2d at 1053; and *see also United States Fidelity and Guaranty Co.*, 309 U.S. at 513. According to the Ninth Circuit, it would be necessary for the tribe to consent to be sued under the counterclaim, *see Squaxin Island Tribe*, 781 F.2d at 723 n.11, in order to find that a tribe has waived its immunity as to the counterclaim and for a court to require subject-matter jurisdiction over that counterclaim. Tyonek did not consent to be sued on the counterclaims raised by the Pucketts and the Slawsons. I reject respondents' contention that Tyonek waived its sovereign immunity as to their counterclaims by initiating the present lawsuit.

Finally, the respondents contend that Tyonek's adoption of a "sue and be sued" clause in its corporate character effectively waived its sovereign immunity for the purposes of this action. I reject this contention. Although the tribes clearly have the capacity to waive their sovereign immunity by adopting "sue and be sued" clauses in their corporate charters, *see, e.g., Standing Rock Sioux Tribe*, 780 F.2d at 1379; *Fontenelle v. Omaha Tribe of Nebraska* 430 F.2d 143, 147 (9th Cir. 1970); *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966), such clauses waive the tribes' immunity only with regard to actions taken by the tribe

in its corporate capacity under section 17, of the Indian Reorganization Act and not the actions it takes in its governmental capacity under section 16 of the Indian Reorganization Act. *See Ramey Construction Co. v. Apache Tribe*, 673, F.2d 315, 320 (10th Cir. 1982); *Parker Drilling*, 451 F. Supp. 1127, 1131, 1136-37; *Kenai Oil and Gas, Inc. v. Department of Interior*, 522 F. Supp. 521, 528-29 (D. Utah 1981); *Atkinson v. Haldane*, 569 P.2d 151, 175 (Alaska 1977).

Since Tyonek is being sued in its section 16, governmental capacity, rather than its section 17, corporate capacity, the "sue and be sued" clause contained in its corporate charter does not operate to waive its sovereign immunity in this action. I reject the respondents' claims that the "sue and be sued" clause contained in Tyonek's corporate charter nullifies the tribal government's defense of sovereign immunity.

For all of these reasons, I reject the respondents' waiver claims. I conclude that Tyonek possessed sovereign immunity as to those counterclaims, and that the counterclaims against Tyonek must be dismissed for lack of subject-matter jurisdiction.

I turn now to the derivative immunity of Tyonek's officers.

The four Tyonek officers, whom the Pucketts and Slawsons have sued in this action, contend that the third-party claims against them are barred for lack of jurisdiction, and they further contend that the third-party claims are barred by their derivative immunity as officers of an Indian tribe. I agree with the contentions of Tyonek's officers. The officers of an Indian tribe possess immunity from suit so long as they are acting in their representative

capacity and within the scope of the authority that the village is capable of bestowing upon them. *See Hardin*, 779 F.2d at 479. Thus to the extent that Tyonek, acting in its section 16 sovereign governmental capacity, possessed the authority to exclude nonmembers of the Village from its "Family Plan" housing, and to the extent that Tyonek officers, who have been named in this action, did not exceed the scope of their delegated authority, those officers have derivative immunity from suit in their actions to enforce Tribal Ordinance 65-32.

There is no basis in the record for a conclusion that the four Tyonek officers acted beyond the scope of their delegated authority in their attempts to enforce the ordinance. Their actions consisted of letter writing, circulating petitions, engaging in public criticism of the Pucketts and the Slawsons, attempting to terminate the leases of the respondents, and, finally, in initiating this lawsuit. Although the Pucketts and the Slawsons have alleged in their pleadings that certain acts of vandalism occurred to their property, there is no evidence in the record or even any express allegation that any of the four third-party defendants was personally responsible for these acts. I conclude that the Tyonek officers did not act beyond the scope of their delegated authority as elected representatives of Tyonek's section 16 government entity.

Whether Tyonek's officials possess derivative immunity from suit centers around a single question: Did Tyonek, acting in its section 16, governmental capacity, have authority to exclude non-members of the Village from its "Family Plan" housing? I conclude that it did.

The record indicates the "Family Plan" houses were constructed with funds that the Village obtained from oil and gas leasing in part of the Moquawakie Reservation during the 1960s. The secretary of the Interior issued those leases in 1063 pursuant to his authority under 25 U.S.C. § 398(a), which authorizes oil and gas leasing of unallocated lands within executive order reservations such as the Moquawkie Reservation:

> Unalloted lands within the limits of any reservation or withdrawal created by Executive Order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in [25 U.S.C. § 398].

25 U.S.C. § 398a: *Fondahn v. Native Village of Tyonek*, 450 F.2d 520, 521 (9th Cir. 1971); *Ollestead v. Native Village of Tyonek*, 560 P.2d 31, 33 (Alaska 1977).

Pursuant to 25 U.S.C. § 398b, the proceeds from the oil and gas leases were held by the federal government in trust "for the use and benefit of the Tyonek Indians, who [were] to be consulted regarding the expenditure of funds." *Fondahn*, 450 F.2d at 522; *Ollestead*, 560 P.2d at 33. Section 398b provides that:

> The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive Order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection

> with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided* That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by act of Congress.

25 U.S.C. § 398b. Thus, by the express terms of section 398b, the funds obtained from Tyonek's oil and gas leases were held in trust for members of the Village alone. It was completely logical, therefore, for Tyonek to use those funds in 1965 to build housing for Village members only, and to attempt to restrict the extent to which these houses would benefit or be used by non-members of Tyonek. I conclude that a section 16 Indian governmental entity, such as Tyonek, possesses the authority to impose restrictions upon the use of property held in trust for the benefit of its members, and to prevent that property from being alienated or diminished. I conclude that Ordinance 65-32 constituted a valid exercise of Tyonek's powers as a section 16 governmental entity, and that the attempts by Tyonek's officers to enforce that ordinance that have been challenged by the Pucketts and the Slawsons in this action did not exceed the scope of Tyonek's sovereign power.

Since the third-party defendant officers all were acting in their representative capacities and within the scope of their authority as validly delegated by Tyonek, I conclude that the claims against them are barred by their derivative immunity as officers of the tribe. *See Hardin*, 779 F.2d at 479-80. Therefore, I dismiss the Pucketts' and the Slawsons' third-party claims against Tyonek's officers for lack of subject-matter jurisdiction.

That will complete this decision, which, as I have indicated, will be filed with the Clerk, and will constitute the decision in this case.

I also direct the Clerk, upon the filing of the decision to prepare a final order dismissing the claims of Tyonek and the counterclaims of the respondents and to dismiss the third-party claims against Tyonek's officers. The approval of the final order prepared by the Clerk shall constitute the final judgment in this case.

(Court adjourned.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 35 INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

JANIS G. ROLLER

JANIS G. ROLLER

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Freedom of religion, of speech and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[1]

FOURTEENTH AMENDMENT

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

25 USC § 398(b) Proceeds from rentals, royalties, and bonuses; disposition

> The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United

States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: Provided, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.
(Mar. 3, 1927, ch 299, § 2, 44 Stat. 1347.)

INDIAN REORGANIZATION ACT

25 USC § 473 (a) Application to Alaska

Sections 1, 5, 7, 8, 15, 17 and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes," approved June 18, 1934 (48 Stat. 984) [25 USCS §§ 461, 465, 467, 468, 475, 477, 479], shall hereafter apply to the Territory [State] of Alaska: Provided, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under section 16, 17 and 10 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS §§ 476, 477, 470, respectively]. (May 1, 1936, ch 254, § 1, 49 Stat. 1250.)

25 USC § 476 Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget [Office of Management and Budget] and the Congress.
(June 18, 1934, ch 576, § 16, 48 Stat. 987.)

25 USC § 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.
(June 18, 1934, ch 576, § 17, 48 Stat. 988.)

25 USC § 495 Annette Islands reserved for Metlakahtla Indians

Until otherwise provided by law the body of lands known as Annette Island, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dison's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtla who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to

time by the Secretary of the Interior.
(Mar. 3, 1891, ch 561, § 15, 26 Stat. 1101.)

INDIAN CIVIL RIGHTS ACT

25 USC § 1301 Definitions

For purposes of this title [25 USCS §§ 1301 et seq.] the term –

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.
(Apr. 11, 1968, P. L. 90-284, Title II § 201, 82 Stat 77.)

25 USC § 1302 Constitutional Rights

No Indian tribe in exercising powers of self-government Shall –

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Apr. 11, 1968, P. L. 90-284, Title II, § 202, 82 Stat. 77.)

25 USC § 1303 Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.
(Apr. 11, 1968, P. L. 90-284, Title II, § 203, 82 Stat. 78.)

FAIR HOUSING ACT

42 USC § 3604 Discrimination in the sale or rental of housing

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any

dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.
(Apr. 11, 1968, P. L. 90-284, Title VIII, § 804, 82 Stat. 83; Aug. 22, 1974, P. L. 93-383, Title VIII, § 808(b)(1), 88 Stat. 729.)

42 USC § 3617 Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by section 803, 804, 805, or 806 [42 USCS §§ 3603, 3604, 3605, or 3606]. This section may be enforced by appropriate civil action.
(Apr. 11, 1968, P. L. 90-284, Title VIII, § 817, 82 Stat. 89.)

CIVIL RIGHTS ACT

42 USC § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R. S. § 1979; Dec. 29, P. L. 96-170, § 1, 93 Stat. 1284.)

42 USC § 1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(R. S. § 1977.)

42 USC § 1982 Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
(R. S. § 1978).

PUBLIC LAW 280

28 USC § 1360 State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the

State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize alienation encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate

proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. (Aug. 15, 1953, c. 505, § 4, 67 Stat. 589; Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, P. L. 85-615, § 2, 72 Stat. 545.)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

43 USC § 1601. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

(c) No provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of

Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of the date of enactment of this Act [enacted Dec. 18, 1971];

(d) no provision of this Act shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;

(e) no provision of this Act shall effect a change or changes in the petroleum reserve policy reflected in sections 7421 through 7438 of title 10 of the United States Code [10 USCS §§ 7421-7438] except as specifically provided in this Act;

(f) no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this Act; and

(g) no provision of this Act shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic

Development Act of 1965, as amended, shall be interpreted to include lands granted to Natives under this Act as long as such lands remain in the ownership of the Native villages or the Regional Corporations.
(Dec. 18, 1971, P. L. 92-203, § 2, 85 Stat. 688.)

43 USC § 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter. The Native residents of each Native village entitled to receive lands and benefits under this Act shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this Act, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents. The initial articles of incorporation for each Village Corporation shall be subject to the approval of Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Regional Corporation stock alienation, annual audit, and transfer of stock ownership on death or by court decree: provisions applicable to Village Corporations; permissive transmittal of audits to congressional committees. The provisions concerning stock alienation,

annual audit, and transfer of stock ownership on death or by court decree provided for Regional Corporations in section 7 [43 USCS § 1606] shall apply to Village Corporations except that audits need not be transmitted to the Committees on Interior and Insular Affairs of the Senate [Energy and Natural Resources] and the House of Representatives.
(Dec. 18, 1971, P. L. 92-203, § 8, 85 Stat. 694.)

43 USC § 1618. Reservations; revocation; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporation

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this Act, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1938 (52 Stat. 593) [25 USCS § 497], are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by the Act of March 3, 1891 (26 Stat. 1101) and no person enrolled in the Metlakatla Indian community for the Annette Island Reserve shall be eligible for benefits under this Act.

(b) Notwithstanding any other provision of law or of this Act, any Village Corporation may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to the date of enactment of this Act [enacted Dec. 18, 1971]. If two or more villages are located on such reserve the election must be made by all of the members or stockholders of the Village Corporations concerned. In such event, the Secretary shall convey the land to the Village Corporation or Corporations,

subject to valid existing rights as provided in subsection 14(g) [43 USCS § 1613(g)], and the Village Corporation shall not be eligible for any other land selections under this Act or to any distribution of Regional Corporation funds pursuant to section 7 [43 USCS § 1606], and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.
(Dec. 18, 1971, P. L. 92-203, § 19, 85 Stat. 710.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.